

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	§	CRIMINAL CASE NO.
	§	1:16-cr-00237-RWS-JSA
v.	§	
	§	
JAMES G. MALONEY,	§	
	§	
Defendant.	§	

**DEFENDANT’S MOTION *IN LIMINE* TO INTRODUCE STATEMENTS
AND NOTES BY GOVERNMENT AGENT#002 AND NOTICE OF
STATEMENTS AND NOTES PURSUANT TO FED. R. EVID. 807**

James G. Maloney files this Motion *In Limine* to Introduce Statements and Notes by Government Agent#002 and Notice of Statements and Notes Pursuant to Fed. R. Evid. 807, and moves to introduce statements and notes by Government Agent#002, whose initials are T.G., in the trial in this action.¹

¹ Upon information and belief, counsel for Dr. Maloney do not believe that the documents attached to this Motion contain classified information. Counsel show that, on May 16, 2023, Dr. Maloney initially attempted to file this Motion through the Department of Justice out of an abundance of caution concerning any potentially classified information. However, counsel were advised by counsel for the Government that they should file this Motion publicly, redacting the names of any government agents. Counsel have redacted the names (including email addresses) of relevant government agents in the documents attached to this Motion and have assigned the witnesses numbers with the prefix “G.A.#,” in keeping with the Court’s Order dated February 16, 2023. *See* Dkt. # 167.

Defendant furthermore provides notice of Government Agent#002's statements and notes pursuant to Federal Rule of Evidence 807(b).

I. BACKGROUND

Counsel for Dr. Maloney shows that on Tuesday, May 16, 2023, counsel for the United States telephoned counsel for Dr. Maloney and informed counsel that a witness whom the defense has identified as Government Agent#002, a former employee of the Central Intelligence Agency (CIA), pursuant to the Court's Order, is suffering from severe memory loss or impairment. Counsel for the United States informed counsel for Dr. Maloney that Government Agent#002's wife informed the Government that Government Agent#002 has no memory of the underlying facts in this case, good or bad. Government Agent#002's wife offered to provide medical records or documentation concerning Government Agent#002's condition.

Government Agent#002 is one of three government agent witnesses whom Dr. Maloney sought to call as a witness in the defense's case-in-chief. He is one of the most critical witnesses for Dr. Maloney's defense. The defense has attempted to contact Government Agent#002's wife to learn more about his condition, and has had no opportunity to request medical records or opinions concerning Government Agent#002's memory loss or impairment.

Dr. Maloney seeks to introduce three categories of evidence by Government Agent#002:

1. Government Agent#002's notebook, or portions thereof, containing notes made by Government Agent#002 in his contracted work to support Government Agent#001 in management of the GTRI projects for the period June 28, 2009, through December 21, 2012.² Government Agent#002's notebook is attached to this Motion as Exhibit A.
2. Electronic mails (emails) sent by Government Agent#002 to non-secure email addresses Dr. Maloney and others during the period of Contract D6308 or its predecessor contract.³ The emails are attached hereto as Exhibit B. The contents of the emails are incorporated herein by reference.

² Upon information and belief, Government Agent#002's notebook does not contain classified information for the reason that it was provided by the Government to the defense in 2017 without any indication that it might contain classified information.

³ Upon information and belief, the emails do not contain classified information for the reason that they were sent to Dr. Maloney and others at non-secure email addresses. Dr. Maloney and his counsel further show that these approximately 47 pages of emails represent Dr. Maloney's and his counsel's good faith efforts to greatly narrow the volume of materials turned over to the Department of Justice in April. Dr. Maloney and his counsel show that they have provided these approximately 47 pages to the Department for classification review prior to trial, but as of the date of this filing have not received the Department's response.

3. A draft presentation prepared by Government Agent#002, attached as Exhibit C, the contents of which are incorporated herein by reference.

The specific portions of Government Agent#002's notebook and notes which Dr. Maloney seeks to admit are as follows:

Bates No(s).	Statement(s)
MAL-0865	"GT needs to purchase video camera!"
MAL-0866	"Camera + SW → system" "Not clandestine modification" "Have [Government Agent 007/Government Agent#001] contact Jen and okay release of eval. SW to us (GTRI) for eval. with our video"
MAL-0867	"Looking for video camera with adequate resolution & android"
MAL-0868	"Finally got email, response from [Government Agent#001]." "[Government Agent#001] has yet to contact..."
MAL-0869	Email from Government Agent#002 dated July 28, 2009, incorporated by reference.
MAL-0870	"Try new Motorola phone microphone"
MAL-0871	"Record audio on cellphone - process" "Basic review all emails looking for video cameras"
MAL-0872	"Video HD cameras - 1 fps - color - sharp detection - use lights to determine distance" "Reviewed last meeting - looking on internet for best video / ?? space camera" "Still looking for concealable camera"
MAL-0873	"Develop our own android platform" "Telecom w/ Houdini + Catwoman"
MAL-0875	"Think strategy for next meeting w/ GT after NVA" "Goals for 10/8 meeting" "Discuss video assistant"
MAL-0878	"Query Houdini - Wild Weasel - ???"
MAL-0879	"There will be a 'strategic planning meeting' in late

	Nov"
MAL-0881	"Called Houdini!"
MAL-0883	"Bluetooth stereo headset" "Reviewed emails from Houdini + Einstein" "Set up GTRI meeting"
MAL-0885	"Prepared brief for Thursday meeting"
MAL-0886	"TI watch → monitor tags" "Kodak zip pocket video camera"
MAL-0887	"Kodak - Video Camera, car detection algorithm"
MAL-0888	"Talked with Houdini - reviewed video surveillance options"
MAL-0889	"Zack → reviewed his work - using 'CARCAM' w/ SD card"
MAL-0890	"New code for watch available soon"
MAL-0891	"Android is our 'base' - buy Nexus 1 units → focus" "Car monitor (needs new name)"
MAL-0894	"Called Houdini" "-buy Zomm's video system"
MAL-0895	"Spy kit-1 - Sunglasses, camera w/ audio"
MAL-0896	"Get 2.2 + android phone"
MAL-0897	"Email to team on - Bluetooth headset w/ iPhone application"
MAL-0898	"Cleaned up presentation"
MAL-0899	"GTRI to acquire more ADV _ s. phones"
MAL-0900	"Get 'CUSH CRAFT' - gut & use as housing"
MAL-0902	"Houdini called - wants copy of 6/24 SA brief"
MAL-0912	"Telecom - cont. - viconreview.com"
MAL-0913	"Requested BT headset"
MAL-0915	"Reviewed antenna work (recap)"
MAL-0917	"Testing VUE zone" "Working with Viacon review"
MAL-0918	"Video camera review continuing. "Drop cam baby Wifi 3G"
MAL-0919	"Get drop cam - sent by GTRI next week" "Contour GPS camera" "Casio BT watch" "Samsung SH100"

	"Sony 3d camera"
MAL-0920	"Withings baby monitor"
MAL-0922	"They will get new drop cams to test"
MAL-0923	"Clearly set out short term goals"
MAL-0925	"Finally able to log on to Guac" "Rework briefing for review by GTRI" "iPad > Windows - Citrix"
MAL-0926	"Aug. Reality is hardest & CIPHER is not doing it"
MAL-0927	"Elder care sensing networks"
MAL-0932	"Still need to prioritize & be prepared to present the case for what/how we do to react to Cipher needs!"
MAL-0933	"MacPro w/ Guac (RW) (stick)" "Mifi - Verizon, Galaxy - S" "Video cam suggestions"
MAL-0935	"We 'all four of us' should have various forms of video collection (personal) - eyeglasses - earbuds"
MAL-0936	"www.lytro.com" "Light field camera focus after the fact"
MAL-0937	"Topics antennas" "Face detection - body detection - realtime notification"
MAL-0938	"Car detection" "- GPS w/ car cam" "Focus do quickly. Mini project - Lenox Sq. - image while walking"
MAL-0939	"Don't spend time on human interface - develop + demo concept" "Is there a commercial 'tag' that connects to cell phone to protect?? Do something."
MAL-0940	"Buy iPad with 3G & never activate" "Wifi hotspot → to cellphone"
MAL-0945	"areas of interest 1. Aware 2. Antennas 3. Tech collection 4. Comms" "The technology : iPod, phone, laptop"
MAL-0946	"Extreme value in everything we do"
MAL-0949	"Requested they evaluate new Zomm cellphone app and proposed 'Tags'"

MAL-0950	"Zomm up and working"
MAL-0951	""Conformal antennas' - fragmented"
MAL-0956	List of travel

The statements and notes should be held to satisfy the requirements of the hearsay exception in Federal Rule of Evidence 807, based upon the fact that the statements and notes possess numerous guarantees of trustworthiness, and are more probative on the points for which they will be offered than other evidence which could be obtained through reasonable efforts. The evidence is directly relevant to Dr. Maloney's defense to the charges in the Indictment.

II. ARGUMENT

Dr. Maloney desires to introduce certain statements and notes made by Government Agent#002 in his defense at trial. Dr. Maloney believes that certain statements and notes by Government Agent#002 constitute favorable evidence directly relevant to Dr. Maloney's defense to the charges against him.

Federal Rule of Evidence 807 provides that:

(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

(1) the statement is supported by sufficient guarantees of trustworthiness--after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

(b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement--including its substance and the declarant's name--so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing--or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Fed. R. Evid. 807. "'The district court has considerable discretion in determining admissibility under [former] Rule [807].'" *United States v. Rodriguez*, 218 F.3d 1243, 1246 (11th Cir. 2000) (quoting *United States v. Munoz*, 16 F.3d 1116, 1122 (11th Cir. 1994)).

If Government Agent#002 has had total memory loss, he is unavailable within the meaning of Federal Rule of Evidence 804. *See* Fed. R. Evid. 804(a)(4) ("A declarant is considered to be unavailable as a witness if the declarant... cannot... testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness").

The admission of Government Agent#002's statements and notes are supported by numerous guarantees of trustworthiness under Rule 807, considering all the circumstances. Government Agent#002 is a former employee of the CIA who subsequently worked at SCITOR as a contractor for another

former employee of the CIA, or Government Agent#001. On August 14, 2017, Government Agent#002 provided his notebook to a Special Agent for the Federal Bureau of Investigation (FBI). According to an FBI form FD-302 for Government Agent#002, he informed the Special Agent that he had maintained the notebook at his residence since he left SCITOR. Government Agent#002 told the FBI agent that the notebook contained his meeting notes relating to contracts between the CIA and the Georgia Tech Research Institute (GTRI).

Contract D6308, and its predecessor contract, were between the United States government and GTRI. *See* Dkt. # 1, ¶ 4. Government Agent#002 was one of the primary contacts for the Government on the Contract, and regularly visited GTRI. Government Agent#002 had every interest to be honest and truthful in his giving directions to GTRI under the Contract, and in his recording and reporting on the actions and progress of GTRI pursuant to the Contract.

The evidence relating to Government Agent#002 is relevant and is probative of Dr. Maloney's defense that the purchased consumer items alleged in the Indictment were purchased for the purposes of Contract D6308, pursuant to the CIA's direction to Dr. Maloney and GTRI to be as creative as possible and to purchase, test, modify, experiment with and demonstrate a wide variety of consumer devices and electronics.

The Court of Appeals has found evidence including testimony from motel employees, *see Rodriguez*, 218 F.3d at 1246; or a letter from an officer of a foreign military, *see United States v. Elkins*, 885 F.2d 775, 785 (11th Cir. 1989); to have sufficient guarantees of trustworthiness, and to be sufficiently probative to admit the evidence pursuant to the residual exception in Rule 807. Admission of Government Agent#002's statements and notes is supported by *United States v. Rouco*, 765 F.2d 983 (11th Cir. 1985), the Court of Appeals held that there was no error in admitting oral statements by a deceased Alcohol, Tobacco and Firearms special agent regarding his acquisition of a sample of cocaine pursuant to former Federal Rule of Evidence 804(b)(5), observing, *inter alia*, that the agent "had every incentive to report truthfully... [and that] the trustworthiness of the challenged out-of-court statement cannot seriously be disputed," *id.* at 994. Similarly, here Government Agent#002 had numerous incentives to make truthful statements as a former employee of an Intelligence Agency and a contractor for the Agency, to assist in the management of GTRI on Contract D6308. Additionally, other courts have found items similar to notebooks to bear sufficient indicia of reliability to be admissible pursuant to the residual exception to the hearsay rule. *See United States v. Treff*, 924 F.2d 975 (10 Cir. 1991) (holding that the trial court properly admitted a diary by the defendant's deceased

husband under the residual exception); *United States v. Sheets*, 125 F.R.D. 172 (D.Utah 1989) (finding that the diary of the defendant's wife was admissible pursuant to the residual exception). Government Agent#002's statements and notes bear sufficient guarantees of trustworthiness, and are more probative than other evidence reasonably obtainable, and should be admitted under Rule 807.

III. CONCLUSION

Based upon the facts and authorities set forth herein, Defendant James G. Maloney requests that the Court grant his James G. Maloney files this Motion *In Limine* to Introduce Statements and Notes by Government Agent#002 and allow admission of Government Agent#002's statements and notes, emails authored by Government Agent#002, at trial pursuant to Federal Rule of Evidence 807(b).

Respectfully submitted, this 17th day of May, 2023.

GILLEN WITHERS & LAKE, LLC

/s/ Craig A. Gillen_____

Craig A. Gillen, Esq.

Georgia Bar No. 294838

Anthony C. Lake, Esq.

Georgia Bar No. 431149

400 Galleria Parkway

Suite 1920

Atlanta, Georgia 30339

Telephone: (404) 842-9700

Facsimile: (404) 842-9750

E-mail: cgillen@gwllawfirm.com

aclake@gwllawfirm.com

THE LAW FIRM OF LAWANDA HODGES, LLC

Lawanda Nowlin Hodges, Esq.

Georgia Bar No. 547413

100 Peachtree Street, Suite 200

Atlanta, Georgia 30309

Phone: (404) 474-0772

Fax: (404) 474-2774

Email: lhodges@lhodgeslaw.com

FINCH MCCRANIE, LLP

David H. Bouchard, Esq.
Georgia Bar No. 712859
229 Peachtree Street, N.E.
Suite 2500
Atlanta, Georgia 30303
Phone: (404) 658-9070
Fax: (404) 688-0649
Email: david@finchmccranie.com

Counsel for Dr. James G. Maloney

CERTIFICATION

The undersigned certifies, pursuant to N.D.Ga.L.Civ.R. 7.1D, that the foregoing document has been prepared with one of the font and point selections (Book Antigua, 13 point) approved by the Court in N.D.Ga.L.Civ.R. 5.1B.

GILLEN WITHERS & LAKE, LLC

/s/ Craig A. Gillen_____

Craig A. Gillen, Esq.

Georgia Bar No. 294838

Anthony C. Lake, Esq.

Georgia Bar No. 431149

400 Galleria Parkway

Suite 1920

Atlanta, Georgia 30339

Telephone: (404) 842-9700

Facsimile: (404) 842-9750

E-mail: cgillen@gwllawfirm.com

aclake@gwllawfirm.com

Counsel for Dr. James G. Maloney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 17th day of May, 2023, the undersigned served the foregoing document by filing the document via the Court's Case Management/Electronic Case Filing (CM/ECF) system, which will automatically serve notice of such filing on the following attorneys of record:

John Russell Phillips, Esq.
Assistant United States Attorney
Stephen H. McClain, Esq.
Assistant United States Attorney
United States Attorney's Office for the Northern District of Georgia
600 Richard Russell Building
75 Ted Turner Drive, S.W.
Atlanta, Georgia 30303
stephen.mcclain@usdoj.gov
russell.phillips@usdoj.gov

Emma Dinan Ellenrieder
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
emma.ellenrieder@usdoj.gov

GILLEN WITHERS & LAKE, LLC

/s/ Craig A. Gillen

Craig A. Gillen, Esq.

Georgia Bar No. 294838

Anthony C. Lake, Esq.

Georgia Bar No. 431149

400 Galleria Parkway

Suite 1920

Atlanta, Georgia 30339

Telephone: (404) 842-9700

Facsimile: (404) 842-9750

E-mail: cgillen@gwllawfirm.com
aclake@gwllawfirm.com

Counsel for Dr. James G. Maloney